83 - 1812

Office - Supreme Court, U.S.
FILED
MAY 4 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. BACHTEL AND DONNA BACHTEL,
Petitioners,

v.

MAMMOTH BULK CARRIERS, LTD.,
Respondents,

v.

TWIN HARBOR STEVEDORING COMPANY,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

Robert D. Duggan*
Marsha J. Pechman
LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ
Attorneys for Petitioners

Office & P.O. Address:
One Union Square, Suite 1500
Seattle, Washington 98101
(206) 624-8844

*Member of United States
Supreme Court Bar

aBCD • Seattle, Washington

27pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals follow this Court's order to reconsider this case in light of *Scindia Navigation Co., Ltd. v. de Los Santos*, 451 U.S. 156 (1981)?

2. Under *Scindia*, was a stevedore's failure to rig safety nets so obviously improvident as to render the shipowner liable for negligence in failing to intervene?

3. Under *Scindia*, is the degree of danger that requires a shipowner to take remedial action a jury question?

4. Did the ship's design and crew's participation in the operation trigger a duty to exercise due care under *Scindia*?

LIST OF PARTIES

The caption contains the names of all parties to the proceedings below.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

The Ninth Circuit Has Failed To Consider This Case In Light Of The Principles Set Forth In *Scindia* 5

1. This Case Is Controlled by 33 U.S.C. §905(b) and This Court's Decision In *Scindia* 5
2. The Ninth and Fourth Circuits Are In Direct Conflict With Regard to the Circumstances Under Which the Shipowner Has a Duty to Intervene 7
3. *Scindia* Does Not Preclude the Trier-of-Fact From Determining What Is So "Obviously Improvident" As to Require the Shipowner to Intervene 8
4. The Ninth Circuit Has Failed to Consider the Active Participation of the Vessel In Direct Contradiction to *Scindia* 10
5. It Is Important That *Scindia* Be Uniformly and Accurately Applied 10

Conclusion 11

Appendices:

Appendix A — Ninth Circuit Court of Appeals Order, June 29, 1981 ..... A-1

Appendix B — Ninth Circuit Court of Appeals Opinion, October 24, 1983 ..... B-1

Appendix C — Ninth Circuit Court of Appeals Order, February 7, 1984 ..... C-1

TABLES OF AUTHORITY

Table of Cases

Bandeen v. United Carriers (Panama), Inc., 712 F.2d 1336 (9th Cir. 1983) 1,4,7,8,9,

Bueno v. United States, 687 F.2d 318 (9th Cir. 1982) . 10

Davis v. Partenreederei M.S. Normannia, 657 F.2d 1048 (9th Cir. 1981) 10

Robertson v. JeffBoat, Inc., 651 F.2d 434 (6th Cir. 1981) 8

Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156 (1981) 4,5,6,7,9,*passim*

SubingSubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982) 10

Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981) 10

Woodruff v. United States of America, 710 F.2d 128 (4th Cir. 1983) 8

Statutes

28 U.S.C. §1254(1) 1

33 U.S.C. §905(b), Harbor Workers' Compensation Act 1-2,5,10

Rules and Regulations

Fed. R. App. Proc. 43 2

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979). On Petition for Writ of Certiorari, the United States Supreme Court vacated the judgment and remanded the case to the Court of Appeals. The opinion is reported as *Mammoth Bulk Carriers, Ltd. v. Bachtel*, 451 U.S. 978 (1981). This Court also granted the Petition for Writ of Certiorari by the plaintiff's employer, Twin Harbor Stevedoring Co., intervenor, and vacated the judgment and remanded the case to the Court of Appeals. *Twin Harbor Stevedoring Co. v. James D. Bachtel*, 451 U.S. 978. On remand, the United States Court of Appeals for the Ninth Circuit entered an order, dated June 29, 1981, which is set forth in Appendix A. The final opinion of the Ninth Circuit Court of Appeals, dated October 24, 1983, is not reported but is set forth in Appendix B. The order of the Court of Appeals for the Ninth Circuit, denying the Petition for Rehearing, is not reported, but is set forth in Appendix C. In its unreported opinion, the court refers to and cites as controlling its decision in *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (9th Cir. 1983).

JURISDICTION

On October 24, 1983, the United States Court of Appeals for the Ninth Circuit reversed the judgment entered in the United States District Court for the Western District of Washington. A petition for rehearing was timely filed and was denied on February 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of the vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of § 933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all of the remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This is an action by a longshoreman, James Bachtel,[1] for damages for devastating personal injuries, and by his wife, Donna Bachtel, for loss of society against Mammoth Bulk Carriers, Ltd., owner of the MAMMOTH FIR. Plaintiffs' claims are predicated on negligence. The right to sue the shipowner arises under 33 U.S.C. § 905(b). Twin Harbor Stevedoring Company, the employer of the plaintiff at the time of his injury, intervened to protect its interest in any third party recovery. The issues between plaintiff and his employer have been resolved.

On June 24, 1975, the plaintiff was employed as a longshoreman by Twin Harbor Stevedoring Company on board the MAMMOTH FIR, a bulk log carrier, moored starboard side to the dock at Aberdeen, Washington. The vessel

---

1. Mr. Bachtel died on December 27, 1982. A personal representative has not been appointed. The Ninth Circuit was so advised at oral argument. The appeal proceeded pursuant to Fed. R. App. Proc. 43.

was fully loaded and the lashing of the deckload was the only work remaining. The ship's crew assisted the longshoremen in the lashing operation. The deckload of logs was contained within steel stanchions along both sides of the vessel. The stanchions rose to 20 feet from the deck and the logs were stowed to within two feet of the top of the stanchions. The stanchions contained no padeyes or method by which safety nets or lines could be rigged. The load was crested in the center of the ship to a height approaching 30 feet from the deck. The deckload was secured with wire cable ropes and heavy chains. Each wire rope and chain was shackled at the lower end to a padeye on the deck. The wire ropes were laid over the top of the logs from both sides of the vessel, at intervals of about 6 feet, in a lacing fashion at the crest of the load. The chains were lifted by a winch from both sides of the vessel and laid athwartship across the crest of the load. Longshoremen, with the assistance of the vessel's crew members, straightened the chains as needed. Each chain was to be secured to its opposing chain by a turnbuckle. James Bachtel was pulling on a chain on top of the deckload on the starboard side when he fell head first, 30 feet to the dock below. James Bachtel suffered multiple head and orthopedic injuries as a result of his fall to the dock.

The MAMMOTH FIR was designed as a bulk log carrier. The lashing system was dictated by the design of the vessel and its operational needs. The lashing method required men to work at the edge of a 20-30 foot dropoff. Notwithstanding the obvious danger created by the lashing system, the MAMMOTH FIR was not equipped with any safety nets or lines, and there was no method or equipment available to permit safety nets or lines to be rigged by the stevedore. The vessel owner knew that the stevedore could not or would not rig any safety devices to protect longshoremen from falling. The logs were slippery and the bark peeled off easily. The ship's own crew participated in the lashing and worked side by side with the plaintiff. (See *Bachtel v. Mammouth Bulk Carrier Ltd.*, 605 F.2d 438, 440 (9th Cir. 1979).)

Plaintiffs commenced this action on June 24, 1975, in the United States District Court for the Western District of

Washington on the basis of diversity jurisdiction. The first trial on May 9, 1977 resulted in a jury verdict and judgment for the plaintiffs in the sum of $266,331.00. The judgment was affirmed on appeal to the Ninth Circuit Court of Appeals.[2] On Petition for Writ of Certiorari, the United States Supreme Court vacated the judgment of the Ninth Circuit Court of Appeals and remanded the case for further consideration in light of *Scindia Steam Navigation Co. v. de Los Santos*, 451 U.S. 156 (1981).[3] The Ninth Circuit then set aside the District Court's judgment, concluded that "a new trial [was] necessary" and remanded the case to the District Court. (See Appendix A.) The case was tried a second time beginning March 1, 1982 in the United States District Court for the Western District of Washington and again resulted in a verdict and judgment in favor of the plaintiffs in the sum of $720,000.00. Mammoth Bulk Carriers, Ltd. again appealed to the Ninth Circuit Court of Appeals and, in a decision filed October 24, 1983, the case was reversed. The Court of Appeals denied the plaintiff's petition for rehearing on February 7, 1984 and indicated that this case was controlled by its decision in *Bandeen v. United Carriers (Panama)*, 712 F.2d 1341 (9th Cir. 1983), in which the court stated "in light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so." (See Appendix B.)

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Ninth Circuit Court of Appeals has (1) failed to follow this Court's order to further consider this case in light of *Scindia*; (2) rendered a decision in conflict with the decision of another circuit and the applicable decisions of this Court; and (3) decided an important question of federal law which should be settled by this Court.

---

2. *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979).
3. *Mammoth Bulk Carriers, Ltd. v. Bachtel*, 451 U.S. 978 (1981).

THE NINTH CIRCUIT HAS FAILED TO CONSIDER THIS CASE IN LIGHT OF THE PRINCIPLES SET FORTH IN *SCINDIA*

1. This case is controlled by 33 U.S.C. §905(b) and this Court's decision in *Scindia*.

In 1972, Congress made major reforms in the Longshoremen's and Harbor Worker's Compensation Act. Under 33 U.S.C. §905(b), unseaworthiness as a ground for recovery was eliminated, while recovery for negligence to longshoremen was permitted. However, §905(b) failed to define the parameters of the negligence standard. This Court addressed the issue in *Scindia Steam Navigation Co. v. de Los Santos*, 451 U.S. 156 (1981), and established broad principles for the determination of shipowner negligence. These principles are illustrated by the following quotes:

> We held in *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415, 89 S.Ct. 1144, 1150, 22 L.Ed.2d 371 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id. at 166-167.

* * *

> . . . It is also accepted that the *vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation.*

Id. at 156, 157. (Emphasis supplied.)

* * *

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Id. at 172.

* * *

> Yet is quite possible, it seems to us, that Seattle's judgment in this respect was so *obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of this condition.*

Id. at 175-76. (Emphasis supplied.)

Certiorari was previously granted in this case. The United States Supreme Court vacated the judgment of the Ninth Circuit Court of Appeals and remanded the case "for further consideration in light of *Scindia*." *Mammoth Bulk Carriers, Ltd. v. Bachtel*, 451 U.S. 978 (1981). At that time, the Ninth Circuit was given an opportunity to review the record and examine the principles of *Scindia*. It then determined that a new trial was necessary. Significantly, it did not hold that the record contained insufficient evidence of defendant's negligence.[4] It also did not hold that defendant's motion for

---

4. In the initial Ninth Circuit opinion, later vacated by the Supreme Court, Judge Kilkenny stated ". . . the evidence of Mammoth's negligence is substantial, if not overwhelming . . .", 605 F.2d 438, 441 (1979).

a directed verdict should have been granted. The Ninth Circuit held that a *new trial was necessary*. That new trial was held. And the Ninth Circuit reviewed the case on an essentially identical factual record after the second trial. At that time the verdict in favor of the plaintiffs was reversed, holding that the court erred in failing to direct a verdict for the vessel owner.

The second time the Ninth Circuit reviewed this case, it ignored the Supreme Court's directive that a vessel owner may be held liable if the actions of the stevedore are so obviously improvident as to require the vessel owner to step in and correct the situation. The Ninth Circuit has given directly contradictory messages. In the first instance a new trial was called for, while in the second instance the plaintiff's claim was eliminated as a matter of law.

2. **The Ninth and Fourth Circuits are in direct conflict with regard to the circumstances under which the shipowner has a duty to intervene.**

The Ninth and Fourth Circuit Courts of Appeal are in direct conflict over the application of the guidelines set forth in *Scindia Steam Navigation Co. v. de Los Santos*, *supra*.

In the instant case, the Ninth Circuit indicated that its decision was controlled by *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (9th Cir. 1983), and that the case at bar was factually indistinguishable from *Bandeen*. In *Bandeen*, the longshoremen were required to work inches from the deckload of logs exposing them to a sheer dropoff. The shipowner was fully aware of the danger presented and also knew that the stevedore would not correct the situation. In *Bandeen*, the Ninth Circuit Court of Appeals held as a matter of law:

> Given the evidence the strongest inference is in favor of the plaintiff, the best that can be said is the ship did not string horizontal lines between the stanchions, and did not insist that the stevedore do so. In light of the legislative history of the 1972 Amendments, we are satisfied that this ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so.

712 F.2d at 1340. As a matter of law, the Ninth Circuit held that this fact pattern was not so "obviously improvident" as to require the stevedore to intervene.

However, the Fourth Circuit Court of Appeals held as a matter of law in a case factually indistinguishable from *Bandeen* that the shipowner had a duty to intervene. *Woodruff v. United States of America*, 710 F.2d 128 (4th Cir. 1983). In *Woodruff*, a stevedore was employed to place a non-skid coating on the deck surface of the vessel. As in *Bandeen*, the men applying this coating were required to work inches from the edge of the deck, exposing them to a sheer dropoff. The shipowner was also fully aware of the danger presented and knew the stevedore would not correct the situation. The Fourth Circuit expressed its view of the shipowner's duty in light of the danger as follows:

> Exposing the longshoremen to the risk of a sheer drop some fifty feet onto the dock below or into the water by foregoing the available safety device without any off-setting precautions was "obviously improvident" as a matter of law. Although the navy may have preferred to rely completely on the stevedore to protect the longshoremen, "in such circumstances it had a duty to intervene" *Scindia, supra*, 451 U.S. at 176, 101 S.Ct. at 1626; *see also, Gill, supra*, 682 F.2d at 1075.

Woodruff, supra, 710 F.2d at 131.

In nearly identical fact patterns, the Courts of Appeals for the Fourth and the Ninth Circuits have thus come to opposite holdings as a matter of law on the duty of a shipowner. The Sixth Circuit Court of Appeals has considered an analagous situation where a longshoreman fell from a barge into the water. *Robertson v. JeffBoat, Inc.*, 651 F.2d 434 (6th Cir. 1981). The court ruled that the vessel should have anticipated the harm that the absence of safety measures might cause.

3. *Scindia* does not preclude the trier-of-fact from determining what is so "obviously improvident" as to require the shipowner to intervene.

Two Circuits have ruled that the circumstances under which a shipowner has a duty to intervene are determined as a matter of law rather than as an issue of fact. This is

an improper application of this Court's ruling in *Scindia*. What conditions exist which render a workplace "so obviously improvident" is a factual issue. A jury properly instructed could make that decision. In the instant case, the jury was so instructed. Judge Pregerson in the dissent in *Bandeen* put it aptly:

> Here, a reasonable jury could have found that the stevedore's conduct exposed the longshoreman to such an unreasonable risk of harm that the duty to intervene imposed on the shipowner required it to remedy the dangerous condition. As the district court noted, the record contains ample evidence from which a reasonable jury could have concluded that some of the defendants had actual knowledge that Jones Washington, in violation of Occupational Safety and Health Administration Regulations, permitted its longshoremen to load logs with stanchions that were not rigged with safety nets or lines to prevent falls overboard. This strengthens the possibility that a reasonable jury could have found Jones-Oregon's conduct "so obviously improvident" that the shipowner was dutybound to step in.
>
> Moreover, a reasonable jury could have concluded that the shipowner, by not equipping the stanchions with permanent reach wires, failed to provide a workplace in which an experienced longshoreman could, by the exercise of reasonable care, carry on his work with reasonable safety.

Bandeen v. United Carriers, *supra*, 712 F.2d at 1341.

Nothing in *Scindia* contemplates that each factual setting be evaluated by the bench, thereby removing it from the province of the jury. Nothing about the fact pattern in the instance case is beyond the comprehension of a jury.

Juries are fully capable of assessing the danger of requiring that men work 30 feet above the dock inches away from the edge on slippery logs. Juries are fully capable of deciding when a shipowner has notice that the stevedore has no intention of correcting the situation or providing any form of safety equipment. Juries are also capable of looking at the configuration of the ship and noting that its design makes it impossible for a stevedore to rig nettings or reach wires. Prior to *Bandeen*, the Ninth Circuit had repeatedly indicated that a directed verdict is not an appropriate vehicle to deter-

mine if there had been a breach of duty under *Scindia*. *Bueno v. United States*, 687 F.2d 318 (9th Cir. 1982); *SubingSubing v. Reardon Smith Line, Ltd.*, 682 F.2d 779 (9th Cir. 1982); *Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir. 1981); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981).

4. **The Ninth Circuit has failed to consider the active participation of the vessel in direct contradiction to *Scindia*.**

It was accepted by the court in *Scindia* that a vessel may be liable if it actively participates in the cargo operations. *Scindia*, *supra*, at 156-157. The lashing operation was carried out for the safety of the crew and the vessel at sea to insure that the load of logs on the deck did not shift or become unstable. For that reason, the ship's crew participated in the lashing operation. At the time of Mr. Bachtel's fall, the loading of logs had ceased and the lashing had begun. Members of the ship's crew actively participated and assisted Mr. Bachtel and his fellow longshoremen in the lashing operation. In addition, officers of the vessel checked and approved the lashing as it progressed. The gear used in the lashing operation was part of the vessel's equipment.

This case is analagous to *Davis v. Partenreederei M.S. Normannia*, *supra*, in which the court held that the vessel's officers had concurrent control over the operation and saw and appreciated the danger presented to the longshoremen. Therefore, the vessel could not escape liability under *Scindia*. In the instant case, the vessel's officers and crew also participated with full knowledge of the danger presented to the longshoremen.

5. **It is important that *Scindia* be uniformly and accurately applied.**

It is clear that Congress intended a major reform by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. It is also clear that this Court considered it important to shape the meaning and parameters of the Act by setting forth the principles in *Scindia*. If those principles are twisted or misapplied by the lower courts, the intent of this Court is frustrated. It is clear that at least two

circuits have applied the rules in *Scindia* in contradictory ways.

The question presented is also important because of the frequency with which it arises. Shipping is a huge industry in the United States. It is essential that vessel owners, stevedores and longshoremen have a set of uniformly applied standards to guide their conduct and to regulate safety. Finally, this case is important because this Court has considered it before and its directives have been ignored.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgements and to resolve the contradictory decisions of the circuit courts of appeal in their applications of the principles as set forth in *Scindia*.

Respectfully submitted this
4th day of May, 1984.

Robert D. Duggan
Marsha J. Pechman of Counsel
LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ
Attorneys for Petitioners

APPENDIX A

[FILED JUN 29 1981
RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellees, v. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellant. TWIN HARBOR STEVEDORING CO., Intervenor.	)	NO. 77-3645
JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellants. v. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellee. TWIN HARBOR STEVEDORING CO., Intervenor.	)	ORDER

Appeal from the United States District Court Western District of Washington

Before: KILKENNY and SNEED, Circuit Judges, and WATERS, District Judge.*

---

* The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

The Supreme Court of the United States having vacated the judgment of this court and remanded for further consideration in the light of Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. ____ (April 21, 1981), and Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980), and it being our considered conclusion that the instructions in the district court do not conform with the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos, supra, and that a new trial is necessary.

Accordingly, it is ORDERED that the judgment of the district court be set aside and that this case be remanded to the district court for further proceedings consistent with the opinion of the Supreme Court in Scindia Steam Navigations Co., Ltd. v. De Los Santos, supra.

APPENDIX B

[A TRUE COPY
ATTEST FEB 15, 1984
PHILLIP B. WINBERRY
Clerk of Court
by: s/s
D.M. Niezen
Deputy Clerk]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES D. BACHTEL, Plaintiff-Appellee, vs.	)	JUDGMENT
MAMMOTH BULK CARRIERS, LTD., Defendant-Appellee, and	)	NO. 82-3259 DC CV 75-455
TWIN HARBOR STEVEDORING COMPANY, Intervenor.	)	JET

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered October 24, 1983

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES D. BACHTEL, Plaintiff/Appellee, vs. MAMMOTH BULK CARRIERS, LTD., Defendant/Appellees, and TWIN HARBOR STEVEDORING COMPANY, Intervenor.	)	NO. 82-3259 USDC NO. C75-455-MT MEMORANDUM

Argued and Submitted:*--July 7, 1983

Decided--October 24, 1983

Appeal from the United States District Court for the Western District of Washington
Hon. Jack E. Tanner, District Judge, Presiding

Before: WRIGHT, CHOY and NELSON, Circuit Judges.

---

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21, of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Mammoth Bulk Carriers, Ltd. (Mammoth) appeals from a judgment of liability in an action brought by James Bachtel and his wife (Bachtel) for damages for personal injury under 33 U.S.C. § 905(b) (1976). Mammoth contends that, as a matter of law, there was no evidence of its negligence and that it was therefore entitled to a directed verdict or a judgment n.o.v. We agree and reverse the judgment of liability against Mammoth.

We review the trial court's failure to direct a verdict or enter a judgment n.o.v. under the same standard the district court applied: viewing the evidence in the light most favorable to Bachtel, was there substantial evidence present that could support a finding for Bachtel. Murphy Tugboat Co. v. Crowley, 658 F.1d 1256, 1260 (9th Cir. 1981); Naton v. Bank of California, 649 F.2d 691, 697 (9th Cir. 1981).

This court has held that "[A] directed verdict is proper if the evidence permits only one reasonable conclusion." Bandeen v. United Carriers (Panama), Inc., No. 81-3641, slip op. at 3771 (9th Cir. Aug. 12, 1983) (citation omitted) (Bandeen).

This case is controlled by our decision in Bandeen. That case affirmed a trial court's directed verdict under indistinguishable factual circumstances from those presented here. The decision considered the OSHA regulation requiring the stevedore to provide safety nets. 29 C.F.R. § 1918.32(b) (1982), and concluded: "If nets or lines were needed, it was the duty of the stevedore to provide them." Slip op. at 3772. Bandeen went on to address the shipowner's duties with regard to attaching the nets or lines, and found that: "Giving the evidence the strongest inferences in favor of the plaintiff, the best that can

be said is that the ship did not string horizontal lines between the stanchions, and did not insist that the stevedore do so." Id. at 3773. We find that the evidence in this case would not warrant a similar statement with respect to lines or nets. Bandeen continues: "In light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so." Id. at 3773-74.

The record in the instant case does not support any inferences more favorable to Bachtel than those reached in Bandeen. Because we review the grant and the denial of a directed verdict by the same standard, Bandeen thus requires us to find that the trial court erred in failing to direct a

verdict or enter a judgment n.o.v. for Mammoth. This is dispositive of the case, so we need not reach any other arguments made on this appeal.

REVERSED.

APPENDIX C

[FILED FEB 07 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES D. BACHTEL, Plaintiff-Appellee, vs. MAMMOTH BULK CARRIERS, LTD., Defendants-Appellees, and TWIN HARBOR STEVEDORING COMPANY, Intervenor.	)	NO. 82-3259 DC# C75-455MT ORDER

Before: WRIGHT, CHOY and NELSON, Circuit Judges.

The panel as constituted in the above case unanimously voted to deny the petition for rehearing and unanimously rejects the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc, and no judges of the court has requested a vote on

the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

Office - Supreme Court, U.S
FILED
JUN 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1812

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. BACHTEL AND DONNA BACHTEL,
Petitioners,

v.

MAMMOTH BULK CARRIERS, LTD.,
Respondent,

v.

TWIN HARBOR STEVEDORING COMPANY,
Intervenor.

BRIEF OF RESPONDENT MAMMOTH BULK CARRIERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John P. Sullivan*
Richard A. Montgomery
BOGLE & GATES
Attorneys for Respondent

Office & Telephone:
2100 Bank of California Center
Seattle, Washington 98164
(206) 682-5151

*Member of the United States
Supreme Court Bar

aBCD • Seattle, Washington

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals properly apply the principles of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), in ruling that the shipowner had no duty to rig safety lines and no duty to insist that the stevedore do so?

TABLE OF CONTENTS

Page

Statement of the Case 2

Summary of Argument 4

Reasons For Denying the Writ 5

I. There Is No Conflict Between the Ninth and Fourth Circuit Courts of Appeals on the Shipowner's Duty to Intervene 5

II. The Ninth Circuit Court of Appeals Followed This Court's Order to Consider the Case in Light of *Scindia*, and Properly Applied the *Scindia* Principles . 10

A. The Ninth Circuit Court of Appeals Followed this Court's Mandate on Remand 10

B. The Ninth Circuit Court of Appeals Applied the *Scindia* Principles 11

C. *Scindia* Does Not Require Every Longshoreman Injury Case to Go to the Jury 12

D. The Ninth Circuit Court of Appeals Correctly Decided the Issue of the Crew's Alleged Involvement in the Lashing Operation 13

III. There is No Important Need for This Case to be Reviewed by the Supreme Court 15

Conclusion 15

TABLE OF AUTHORITIES

Table of Cases

Bandeen v. United Carriers (Panama) Inc., 712 F.2d 1336 (9th Cir. 1983) 4,6,7,8-9

Bonds v. Mortensen and Lange, 717 F.2d 123 (4th Cir. 1983) 9,14

Bueno v. United States, 687 F.2d 318 (9th Cir. 1982) . . 6

Davis v. Partenreederei M.S. Normannia, 657 F.2d 1048 (9th Cir. 1981) 6

Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982) 6

Hill v. Texaco, Inc., 674 F.2d 447 (5th Cir. 1982) 7

Mammoth Bulk Carriers, Ltd. v. Bachtel, 451 U.S. 978 (1981) 4,10

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) 4,5,6,7,8,*passim*

Woodruff v. United States, 710 F.2d 128 (4th Cir. 1983) 8,9

Statutes

33 U.S.C. § 941 7

Rules and Regulations

Fed. R. Civ. P. 50 12

9th Cir. Rule 21(c) 15

Other Authority

Restatement (Second) of Torts § 414, comment c (1965) 14

No. 83-1812

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. BACHTEL AND DONNA BACHTEL.
Petitioners,

v.

MAMMOTH BULK CARRIERS, LTD.,
Respondent,

v.

TWIN HARBOR STEVEDORING COMPANY.
Intervenor.

BRIEF OF RESPONDENT MAMMOTH BULK CARRIERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Mammoth Bulk Carriers, Ltd.[1] respectfully requests that the petition for writ of certiorari be denied.

1. At the time of the incident at issue, Respondent Mammoth Bulk Carriers, Ltd. was owned by Trans Union Ocean Shipping Group, Inc. In December, 1981 Trans Union was purchased by Rosemont Shipping, Ltd., a privately held company.

STATEMENT OF THE CASE

Petitioner James Bachtel was injured on June 29, 1974, when he fell overboard from Respondent's ship, the MAMMOTH FIR, while in the course of his employment as a longshoreman. His stevedore/employer, Twin Harbor Stevedoring Co., was engaged in loading and lashing logs on the MAMMOTH FIR in the Port of Aberdeen, Washington. Loading had begun four days before. All of the logs had been loaded by the longshoremen at the direction of the stevedore. Reporter's Transcript at 120 (hereinafter cited as "RT"). After the logs were loaded underdeck, the hatches were closed and the logs were loaded on the deck. When the on-deck load was topped off and crowned, the longshoremen began to "lash" the load to the deck. The object of lashing was to secure the deckload of logs to the ship. This involved hooking lashing chains and wires on the ship's cranes, and pulling the lashing chains across (athwartships) the top of the load with the ship's cranes. RT at 51-52. The ship's cranes were operated by winch drivers, RT at 50, 56, who were also employed by the stevedore. RT at 128. When the chains were finally pulled across the deckload, the longshoremen tightened them down with turnbuckles, creating a secure stow. RT at 53.

At trial, Mr. Bachtel had no recollection of any of the details of his fall. The trial court had to rely on others who observed various aspects of his fall. According to his longshoreman-partner, Mr. Bachtel and his fellow longshoremen were engaged in the lashing procedure at the time of his fall. After a lashing chain had been pulled across the top of the load, Mr. Bachtel and his partner were taking the twists out of the chain so it would lie flat. Mr. Bachtel was near the edge of the deckload, and his partner was five or ten feet inboard. RT at 54. Mr. Bachtel was working on his hands and knees. RT at 56. The next thing his partner knew, Mr. Bachtel had disappeared over the side. RT at 56. The only thing his partner saw was Mr. Bachtel's feet going over, and he did not actually see him fall. RT at 130.

Mr. Bachtel's fall was witnessed by a woman sitting in a car on the dock. She could see Mr. Bachtel very clearly. RT

at 338-40. He was walking on the logs, and "[a]ll of a sudden he just fell." RT at 340.

Regardless of whether Mr. Bachtel was on his hands and knees, or walking, when he fell, it is undisputed that the Respondent/shipowner had no part in causing him to fall. There was no malfunctioning of ship's equipment. Rather, Petitioners' sole theory is that the shipowner should have rigged lines or nets as a barrier around the perimeter of the ship, or insisted that the stevedore do so.

The lashing operation was being conducted by the stevedore. The lashing operation in the Port of Aberdeen has traditionally been performed exclusively by the stevedore, although the ship's crew often will make a final check to make sure the lashings are tight so the logs will not shift at sea. Clerk's Record 113 at 34 (hereinafter cited as "CR"). Mr. Bachtel fell from atop the deckload of logs, a working surface and working environment that the stevedore had created through loading. RT at 120-21, 152.

On the day of Mr. Bachtel's fall, the lashing was proceeding in the same manner it had on every log ship in the Port of Aberdeen, both before and after the MAMMOTH FIR's call. The witnesses with a background in longshoring called at trial had a sum total of 59 years of work loading log ships in the Pacific Northwest. RT at 46, 240; CR 113 at 33. *Not one* of the witnesses had ever seen, either before or after Mr. Bachtel's injury, a line or net rigged around the perimeter of a log ship. RT at 69-70, 251-52; CR 113 at 33. Two expert witnesses were called at trial. Neither testified that rigging lines or nets would be a feasible or safe alternative. Neither testified that rigging lines or nets would minimize the risk of people falling overboard. One of the experts had once observed safety belts used by longshoremen on a deckload of logs. These safety belts had been requested by the longshoremen and provided by the stevedore. RT at 253, 260.

On this record, the Ninth Circuit Court of Appeals determined that the shipowner was entitled to a directed verdict or judgment notwithstanding the verdict. The case was deemed to be controlled by the Ninth Circuit Court of Ap-

peals' previous opinion in *Bandeen v. United Carriers (Panama) Inc.*, 712 F.2d 1336 (9th Cir. 1983). The court indicated that it had searched the record in this case for any inferences that would permit a jury to find negligence on the part of the shipowner, and could find none. Memorandum Opinion of Ninth Circuit Court of Appeals, October 24, 1983 (text set forth in Brief of Petitioners, Appendix B at B-3 through B-7) (hereinafter cited as "Memorandum Opinion Below").

SUMMARY OF ARGUMENT

This Court previously remanded this case to the Ninth Circuit Court of Appeals for further consideration in light of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). *See Mammoth Bulk Carriers, Ltd. v. Bachtel*, 451 U.S. 978 (1981). On remand, the Court of Appeals held that the district court's instructions did not conform with the requirements of *Scindia*, set aside the first judgment, and ordered further proceedings in accordance with *Scindia*. Unquestionably, that disposition complied with this Court's mandate on remand.

On the record from the second trial, the Ninth Circuit Court of Appeals held that the trial court should have directed a verdict or entered judgment n.o.v. for the Respondent shipowner. The Court of Appeals reasoned that the stevedore, not the shipowner, had the duty to rig safety lines if they were needed, and that the shipowner had no duty to intervene in the stevedore's decision not to do so. Because the trial record contained no evidence of defective ship's gear or of an obviously improvident decision by the stevedore to proceed with the work despite any such defect—decisive factors in *Scindia*—the Ninth Circuit's holding conforms entirely with *Scindia* and is therefore correct as a matter of law.

The alleged conflict between the Ninth and the Fourth Circuits is nonexistent. In the only Fourth Circuit case cited by Petitioners to delineate such a conflict, the shipowner's equipment and acts had caused the longshoreman's injury. That factually distinctive basis for shipowner liability is

legally consistent with *Scindia* and with the disposition below.

The Ninth Circuit Court of Appeals followed this Court's instructions on remand and applied *Scindia* properly. The petition for writ of certiorari presents neither an important, unsettled legal question nor a conflict between federal Courts of Appeals. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Ninth and Fourth Circuit Courts of Appeals on the Shipowner's Duty to Intervene.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court stated that it was "quite possible" that the stevedore's judgment in continuing to work with a defective winch was "so obviously improvident" that the shipowner—if it knew that the ship's gear was defective and that the stevedore was continuing to use the winch—should have realized the unreasonable risk and intervened to repair the winch. *Id.* at 175-76. In deciding whether the duty to intervene had been triggered, it was relevant to consider the stevedore's duties, the shipowner's justifiable expectations that the stevedore would perform its duties safely, and any duties to repair defective ship's gear placed on the shipowner by statute, regulation or custom. *Id.* at 176. This Court recognized that the question of whether a shipowner's duty to intervene had been triggered was a decision to be made by the lower courts by applying the *Scindia* principles to the facts of each particular case. *Id.* at 178. This Court did not tell the Ninth Circuit Court of Appeals how it should decide the issue of the shipowner's duty to intervene in *Scindia*; it merely gave guidelines for the lower courts to apply ("We raise these questions but do not answer them, since they are for the trial court in the first instance. . . ." *Id.*).

As a ground for requesting certiorari in this case, Petitioners argue that the Ninth and Fourth Circuit Courts of Appeals are in conflict on the issue of the shipowner's duty to intervene. A close examination of the purportedly conflic-

ting cases will show, on the contrary, that the *Scindia* principles were and continue to be applied by both Circuits. Any differences in the outcome of the cases are the product of different factual evidence.

The Ninth Circuit Court of Appeals' decision in the case at bar was heavily influenced by its earlier opinion in *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (9th Cir. 1983). In *Bandeen*, a longshoreman fell overboard from a deckload of logs. He predicated his claim of shipowner negligence on a failure to provide safety wires or netting between the ship's stanchions. The court affirmed the trial judge's directed verdict for the shipowner. The court began its analysis by applying the *Scindia* principles relating to the shipowner's duty to intervene. *Id.* at 1339 (citing *Scindia* at 451 U.S. 175-76). The *Bandeen* court concluded that applicable federal regulations imposed a duty on the *stevedore*, not the shipowner, to provide the safety wires and netting, if needed. 712 F.2d at 1339. Giving the longshoreman the strongest inferences from the evidence, the Court concluded:

> In light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so.

Id. at 1340.

The *Bandeen* court distinguished *Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir, 1981), *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), and *Bueno v. United States*, 687 F.2d 318 (9th Cir. 1982), on the ground that, unlike those cases, the shipowner's equipment and acts had not caused the plaintiff's injury. 712 F.2d at 1340.

In the case at bar, Mr. Bachtel fell from a deckload of logs. He predicated his claim of shipowner negligence on the same ground as Mr. Bandeen—failure to provide safety lines and netting. A different panel of the Ninth Circuit Court of Appeals from that in *Bandeen* examined the record and concluded that the "record in the instant case does not support any inferences more favorable to Bachtel than those reached in *Bandeen*." Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-6).

In both *Bandeen* and *Bachtel*, the Ninth Circuit Court of Appeals stated: "If nets or lines were needed, it was the duty of the stevedore to provide them." *Bandeen*, 712 F.2d at 1339; *Bachtel*, Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-5). The stevedore, not the shipowner, was in the best position to supply its employees with safety equipment, if needed.

This finding is consistent with the guiding principles of *Scindia*. There, this Court emphasized the stevedore's statutory duty (33 U.S.C. § 941) to provide its longshoremen-employees with a safe place to work and safe equipment. *Scindia*, 451 U.S. at 170. In discussing the shipowner's justifiable expectations regarding the stevedore's expertise, this Court stated:

> The shipowner defers to the qualification of the stevedoring contractor in the *selection and use of equipment* and relies on the competency of the stevedore company.

Id. at 171-72 (emphasis added). In his concurring opinion in *Scindia*, Justice Powell stated: "I join the Court's opinion because I agree with its basic thrust—placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards." *Id.* at 180 (J. Powell concurring). *See also Hill v. Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982) (duty to require longshoreman to wear safety belt was stevedore's, not shipowner's).

In neither *Bandeen* nor *Bachtel* did the Ninth Circuit Court of Appeals find a duty on the shipowner to intervene and insist that the stevedore rig lines. Neither case involved malfunctioning ship's gear, as in *Scindia*. In the case at bar, the alleged negligence was a failure to supply safety equipment to be used at a certain stage of the cargo operations—during lashing. Yet, no witness at trial had ever observed lines or nets rigged, and no witness testified that rigging lines or nets would be a feasible or safe alternative. How can it be "obviously improvident" to work under conditions that are normal and customary, that no one has ever seen performed differently and where there is nothing in the record to support the conclusion that there were safer and more

feasible alternatives? If "obviously improvident" means anything, it means that something is being done that usually is not (i.e., malfunctioning gear), or something is not being done that usually is done, and the departure from the norm is *obvious* and continued work in the face of it is *improvident*. Here, the stevedore was complying with the norm, the custom and standard in the industry. The Ninth Circuit Court of Appeals correctly found that these circumstances did not trigger the shipowner's duty to intervene.

Petitioners argue that *Bandeen* and *Bachtel* are in conflict with *Woodruff v. United States*, 710 F.2d 128 (4th Cir. 1983). In *Woodruff*, a longshoreman fell overboard from a United States Navy aircraft carrier. His fall occurred where there was a gap in the safety netting around the perimeter of the vessel. The evidence showed that the Navy had designed and installed safety wiring around the entire ship, including the particular area where the longshoreman fell, but the wiring in that particular area was not in place on the day of the injury. The trial court found that the wiring was under the Navy's (shipowner's) control, not the stevedore's.

The *Woodruff* court applied the same *Scindia* principles as applied in *Bandeen* and *Bachtel* with regard to the shipowner's duty to intervene. *Id.* at 130. In applying those principles to the facts, the Fourth Circuit Court of Appeals concluded that the shipowner had negligently omitted to put in place *shipowner equipment*, which the *shipowner had designed and undertaken to install*, and which was *under the shipowner's control*. *Id.* at 130-31.

This is the determinative factual difference between *Bandeen* and *Bachtel*, on the one hand, and *Woodruff* on the other. While in *Bandeen* and *Bachtel*, the Ninth Circuit Court of Appeals concluded that applicable regulations and custom placed a duty on the stevedore to provide safety wires and netting if deemed necessary, in *Woodruff* the Fourth Circuit Court of Appeals concluded that the shipowner had *assumed* the duty to provide safety wires because it had designed and installed wires, had control of the wires, and had removed them on the day of the injury. As the *Bandeen* court stated in distinguishing its ruling from other cases: "In this case,

the shipowner's equipment and acts did not cause the injury." 712 F.2d at 1340.

Further, a decision by the Fourth Circuit Court of Appeals after *Woodruff* indicates that the Fourth Circuit itself considers *Woodruff* to be a case determined by its unique facts. In *Bonds v. Mortensen and Lange*, 717 F.2d 123 (4th Cir. 1983), decided three months after *Woodruff*, the Fourth Circuit Court of Appeals reversed a judgment in favor of the longshoreman, ruling as a matter of law that the shipowner had no duty to intervene. In *Bonds*, a longshoreman was pinned between the leg of a moving gantry crane (ship's equipment) and a hatch pedestal. The trial court found that the injury was caused by a malfunctioning warning bell (ship's equipment) on the crane, and the ship's design. 717 F.2d at 124-25. The bell had been malfunctioning from the commencement of stevedoring operations. The Fourth Circuit Court of Appeals stated:

> [T]he malfunctioning bell and ship's design being obvious and known to all, the shipowner was entitled to rely on [the stevedore's] judgment as to whether discharge operations could be safely undertaken. [The stevedore] obviously concluded that these conditions did not pose an unreasonable risk of harm. . . .

Id. at 127-28 (footnote omitted). The Fourth Circuit Court of Appeals distinguished *Woodruff* on its facts. *Id.* at 128 n.5. Thus, even in a case of malfunctioning ship's equipment, the Fourth Circuit Court of Appeals has not imposed a duty upon the shipowner to intervene. This is further evidence that the lower courts are deciding each particular case on its own facts and merits, in light of the *Scindia* principles.

In summary, there is no direct or irreconcilable conflict between the Ninth and Fourth Circuit Courts of Appeals. Both Circuits have applied the relevant principles of *Scindia* in deciding whether the shipowner's duty to intervene has been triggered; both have considered the stevedore's duties under law; both have considered the shipowner's justifiable expectations that the stevedore will perform its duties; and both have considered the duties placed upon the shipowner by statute, regulation or custom. These considera-

tions are what *Scindia* requires. The difference in the outcomes of particular cases is simply the result of different factual situations.

II. The Ninth Circuit Court of Appeals Followed This Court's Order to Consider the Case in Light of *Scindia*, and Properly Applied the *Scindia* Principles.

A. The Ninth Circuit Court of Appeals Followed this Court's Mandate on Remand.

When this case was first before the Court in 1981 on petition for writ of certiorari following the first trial, this Court vacated the judgment of the Ninth Circuit Court of Appeals and remanded the cause "for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos. . . ." *Mammoth Bulk Carriers Ltd. v. Bachtel*, 451 U.S. 978 (1981). On remand, the Ninth Circuit Court of Appeals considered the case in light of *Scindia*, and stated:

> [I]t being our considered conclusion that the instructions in the district court do not conform with the requirements of *Scindia . . . a new trial is necessary.*
>
> Accordingly, it is ORDERED that the judgment of the district court be set aside and that this case be remanded to the district court for further proceedings consistent with the opinion of the Supreme Court in *Scindia*. . . .

Order of Ninth Circuit Court of Appeals, filed June 29, 1981 (text set forth as Appendix A to Brief of Petitioners) (emphasis added).

As a ground for requesting certiorari, Petitioners contend that the Ninth Circuit Court of Appeals "failed to follow this Court's order to further consider this case in light of *Scindia*." Brief of Petitioners at 4. Petitioners' contention is clearly wrong. The Ninth Circuit Court of Appeals specifically stated in its remand order that it was a "considered conclusion" that the jury instructions at the first trial did not conform with *Scindia*. The Ninth Circuit Court of Appeals considered *Scindia*'s principles, applied them to the jury instructions given at the first trial, and found those instructions wanting. Setting aside the judgment and remanding for a new trial was the only way to correct this error. The Ninth Circuit did *exactly* what this Court directed it to do.

Once the Ninth Circuit Court of Appeals set aside the judgment from the first trial and remanded for a second trial, the trial record from the first trial was a nullity. The slate was wiped clean, and the parties had to make an entire new record at the second trial. The record made at the second trial was not "essentially identical" to the first trial, as Petitioners argue, but in truth was vastly different. This is the reason the Ninth Circuit Court of Appeals, when the case was before it on appeal following the second trial, found that Respondent should have been granted a directed verdict or judgment notwithstanding the verdict. It is the record from the second trial, not the first, that was before the Court of Appeals and is the subject of this petition for writ of certiorari. Each appeal can only be judged by the record upon which it is founded.

What Petitioners propose is that the Ninth Circuit Court of Appeals somehow contradicted itself in its evaluation of the record from the first trial and second trial. It should be remembered, however, that the Ninth Circuit Court of Appeals on remand held that the law applied at the first trial was inconsistent with *Scindia*. On the second appeal, the record was considered in light of *Scindia*. Rather than contradicting itself, the Ninth Circuit Court of Appeals corrected itself. It considered the case in light of *Scindia*, as this Court had directed. There is no substance to Petitioners' contention that the Ninth Circuit Court of Appeals did not follow this Court's mandate.

B. The Ninth Circuit Court of Appeals Applied the Scindia Principles.

As part of their argument that the Ninth Circuit Court of Appeals failed to consider this case in light of *Scindia*, the Petitioners contend that "the Ninth Circuit . . . ignored the Supreme Court's directive that a vessel owner may be held liable if the actions of the stevedore are so obviously improvident as to require the vessel owner to step in and correct the situation." Brief of Petitioners at 7. The language of the decision of the Ninth Circuit Court of Appeals indicates otherwise:

> *Bandeen* continues: "In light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so." *Id.* at 3773-74.
>
> The record in the instant case does not support any inferences more favorable to Bachtel than those reached in *Bandeen*.

Memorandum Opinion Below, (Brief of Petitioners, Appendix B at B-6).

From the foregoing quoted language, it is beyond dispute that the Ninth Circuit Court of Appeals considered the shipowner's "duty to intervene" and searched the record in vain for inferences that would trigger that duty.

C. Scindia Does Not Require Every Longshoreman Injury Case to Go to the Jury.

The Ninth Circuit Court of Appeals ruled that the trial court should have directed a verdict or entered judgment notwithstanding the verdict for Respondent, the shipowner. In the Brief of Petitioners at 8-10, Petitioners advance the proposition that it is inappropriate for the trial judge or the reviewing appellate court to direct a verdict in a longshoreman injury case. Petitioners argue that "[n]othing in *Scindia* contemplates that each factual setting be evaluated by the bench, thereby removing it from the province of the jury." Brief of Petitioners at 9. Petitioners would apparently have this Court hold that Rule 50 of the Federal Rules of Civil Procedure is not applicable to longshoreman injury cases.

Respondent has discovered nothing in *Scindia*, or any other opinion of this Court, that would support such a proposition. This Court in *Scindia* made reference to a trial judge's necessary review of the evidence prior to submission to the jury. On the very same issue—the shipowner's duty to intervene—that Petitioners argue should always go to the jury, this Court stated in *Scindia*:

> If Scindia was aware that the winch was malfunctioning to some degree, and *if there was a jury issue* as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?
>
> We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them *unless there is sufficient evidence to submit to the jury* either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition.

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 178 (1981).

This case, like all others, must be judged on its facts. If the evidence presented at trial can lead to only one reasonable conclusion, then a directed verdict is appropriate.

D. The Ninth Circuit Court of Appeals Correctly Decided the Issue of the Crew's Alleged Involvement in the Lashing Operation.

In the Brief of Petitioners at 10, Petitioners state that the Ninth Circuit Court of Appeals "failed to consider" the alleged participation of the crew in the lashing operation. This issue was fully briefed and presented to the Court of Appeals. See Appellants' Opening Brief at 33-36. What Petitioners are really saying is that they do not agree with the way the Ninth Circuit Court of Appeals decided the issue.

Petitioners' assertion that members of the ship's crew participated in the lashing operation is misleading and not supported by the record. Indeed, Petitioners have made *no* references to the trial record whatsoever. One longshoreman testified at trial that a single crew member was helping the longshoremen with the lashing. RT at 54-55. This crew member was "down below" on the ship's rail, which was even with the level of the dock where Mr. Bachtel landed *after* his fall. RT at 54-55. Thus, the crew member was some 30

feet below the area where Mr. Bachtel was working. RT at 59. The crew member working "down below" was doing work that the longshoremen considered undesirable, and they asked the crew member to do it. RT at 131-32. In contrast, there were three other longshoremen working in the immediate vicinity of Mr. Bachtel when he fell. RT at 141, 154.

The longshoreman-witness also testified that three other crew members were on deck at the time, RT at 55, but there was no testimony as to what these crew members were doing, and certainly no evidence that they were actively participating in the lashing being performed by the longshoremen.

The presence of crew members on deck observing the cargo operations of the stevedore does not constitute the "active involvement" of the shipowner. *Bonds v. Mortensen and Lange*, 717 F.2d 123, 127 n.4 (4th Cir. 1983). Even it it did, however, more is required under *Scindia*. Not only must the shipowner actively involve itself in the cargo operations, but it must also *negligently injure* the longshoreman as a result of its active involvement. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981). There was no evidence at trial that the shipowner or its crew had anything to do with causing Mr. Bachtel's fall. In fact, the crew member "down below" saved Mr. Bachtel's life by jumping off the rail and preventing him from slipping between the ship and dock. RT at 131.

Petitioners also assert that the ship's crew had concurrent control over the cargo operations. Brief of Petitioners at 10. Again, this is unsupported by the record. The weight of the evidence at trial was that the lashing of logs was a *stevedore* function, and that the crew was customarily involved only to the extent of doing a final check to ensure that the lashings were tight. CR 113 at 34. There was no evidence that the shipowner was actively directing the details or controlling the methods of the stevedore's lashing work. *See Restatement (Second) of Torts* § 414, comment c (1965). If, for instance, Mr. Bachtel had been injured in the ship's engine room or galley, or other non-cargo area, then arguably the area would have been under the active control of the

shipowner. The fact is, however, Mr. Bachtel was injured in the course of his employment for the stevedore in the cargo area of the ship while engaged in cargo lashing.

III. There is No Important Need for This Case to be Reviewed by the Supreme Court.

This case is purely a dispute between individual litigants, with consequences to those individual litigants only. The Memorandum Opinion of the Ninth Circuit Court of Appeals is unpublished, and by its express terms, cannot be cited to or by the courts of the Ninth Circuit except as provided by Rule 21(c) of the Rules of the Ninth Circuit Court of Appeals. Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-3).

The fact that this case was before this Court following the first trial should have no bearing on the merits of the petition for writ of certiorari following the second trial. This Court's mandate was followed, the case was re-tried, and a new and different record was before the Ninth Circuit Court of Appeals following re-trial.

Lastly, there is no need for this Court to again pass on the issue of the duties owed by a shipowner to a longshoreman. Those duties were comprehensively reviewed in *Scindia*. The *Scindia* principles were applied, and applied correctly, by the Ninth Circuit Court of Appeals.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this
5th day of June, 1984,

John P. Sullivan
Richard A. Montgomery of Counsel
BOGLE & GATES
Attorneys for Respondent